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No. 88-522

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NEW YORK HOTEL TRADES COUNCIL AND HOTEL ASSOCIATION OF NEW YORK CITY, INC. PENSION FUND and VITO J. PITTA and ALBERT A. FORMICOLA, as Trustees of New York Hotel Trades Council and Hotel Association of New York City, Inc. Pension Fund,

Petitioners,

v.

PARK SOUTH HOTEL CORP.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

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November 4, 1988

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Pursuant to Rule 22.5, petitioners respectfully submit this Reply Brief to address arguments first raised by the Brief in Opposition of respondent Park South Hotel Corporation ("PSHC" or "Respondent").

1. *The Decision Below is Clearly Erroneous*

In the Petition, we demonstrated that, by concluding that the obligation to contribute continued, the Second Circuit misinterpreted the partnership law consequences of the sale of 100% of the partnership interests to Donald Trump. *See*, the Petition at 13-16. The Court of Appeals failed to consider N.Y.

Partnership L. § 72(4) (McKinney 1988), which bars liability by a successor partnership for the debts of its predecessor, dissolved by a 100% change in membership, if the incoming partners have *not* promised to pay the debts.

Respondent suggests that *Kanarek* v. *Gadflex Associates*, 115 A.D.2d 592, 496 N.Y.S.2d 253 (2d Dept. 1985), *app. denied*, 67 N.Y.2d 602 (1986), supports the Second Circuit's error. However, in *Kanarek*, the limited partnership never dissolved: its sole general partner assigned his interest but continued "to serve and perform the functions of his position". *Kanarek*, *supra*, 115 A.D.2d at 592. Consequently, the issue of a successor partnership's liability for its predecessor's debts never arose.

By contrast, in this case, PSHC and its partners (the "PSHC partnership") dissolved their partnership by withdrawing from any participation in the partnership business. *See*, the Petition at 14. Their successors, Trump and Barbizon Plaza Realty Corporation, refused to assume the obligations of the dissolved partnership, including the obligation to contribute. Accordingly, the PSHC partnership's obligation to contribute ceased, thereby triggering a withdrawal pursuant to 29 U.S.C. § 1383.

2. *Respondent Misapplies the Decision in the Connors Case*

Respondent's reliance on *Connors* v. *B & W Coal Co.*, 646 F. Supp. 164 (D.D.C. 1986), is misguided. Contrary to respondent's assertions, *Connors* offers no escape from withdrawal liability where a sale of partnership interests terminates the original employer's obligation to contribute.

First, as the District Court below pointed out, *Connors* involves a mistaken application of 29 U.S.C. § 1398, the "change in business form" exemption, to sales of partnership interests:

> [PSHC] does not and cannot argue that the transfer of 100% of the partnership interests is covered by

> § 1398(1)(B), which excepts from the definition of a withdrawal "a change to an unincorporated form of business enterprise." The clear implication of this exception is that the exception only applies when a corporation changes to an unincorporated association. Since the partnership was concededly never incorporated in the first place, § 1398(1)(B) does not apply.
>
> Although neither party has cited the case, the Court notes that at least one district court has interpreted § 1398(1)(B) to apply to a factual situation in which one partner in a two-party partnership is replaced with another partner. *See Connors v. B & W Coal Co.*, 646 F. Supp. 164 (D.D.C. 1986). This case, which apparently interprets "a change *to* an unincorporated association" to include a change *in* an unincorporated association, appears to be at odds with the plain language of the statute.
> (Emphasis in original.)

671 F. Supp. at 1005 n.9 (36a).[1] Therefore, to the extent that PSHC relies on this aspect of *Connors*, respondent invokes a holding which this Court should disapprove.[2]

Second, even if § 1398 were applicable to sales of partnership interests, the exemption is expressly limited to changes in business form which cause "no interruption in employer contributions or obligations to contribute", and therefore, has no application to the instant case. 29 U.S.C. § 1398. The District Court below pointedly noted:

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[1] Numbers in parentheses followed by "a" refer to pages in the Appendix to the Petition.

[2] The district court in *Connors* defined "employer" to include partnerships, regardless of *context*. *See*, *Connors*, *supra*, 646 F. Supp. at 168. In the context of § 1398, such a definition becomes nonsensical: a partnership obviously cannot change its "*corporate* structure" or "*to* an unincorporated form" (emphasis supplied). 29 U.S.C. § 1398.

> In any event, the *Connors* case is clearly distinguishable from the instant action. Section 1398(1)(B) will only apply if the new partnership not only continues contributing to the Fund, but also assumes the old partnership's obligation to contribute. *See* 29 U.S.C. § 1398. In *Connors*, the agreement transferring the partnership interests "clearly transferred . . . all of the benefits and obligations of the predecessor" partnership. *See Connors, supra*, 646 F. Supp. at 169. In the instant case, however, the purchase agreement did not transfer any obligations of Park South Associates I to the partners of Park South Associates II and, indeed, the agreement specifically provided that Trump would not assume any liabilities of the old partners. In view of that circumstance, even assuming *arguendo* that § 1398(1)(B) could apply to a 100% change in a partnership's membership, that section would still be inapplicable.

671 F. Supp. at 1005 n.9 (36a).[3]

Significantly, to determine whether or not the obligation to contribute had ceased, thereby resulting in a withdrawal, the district court in *Connors* examined the agreement which transferred the partnership interests. *See*, *Connors*, *supra*, 646 F. Supp. at 169. Thus, even *Connors* rejects respondent's contention that the terms of such agreements have no relevance to the issue of withdrawal.[4]

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[3] Unlike the instant case, *Connors* involves a transfer of *less than* 100% of the partnership interests in a business. Consequently, unlike the obligation to contribute herein, the obligation to contribute in *Connors* also continued to exist by operation of state law. *See*, N.Y. Partnership L. § 72 (McKinney 1988); *see also*, the Petition at 14-15.

[4] Respondent's argument confuses withdrawal liability with obligations to contribute, thereby repeating an error committed by the Second Circuit. *See*, the Petition at 16-17. As *Connors* notes, these two types of obligations are distinct. *See*, *Connors*, *supra*, 646 F. Supp. at 169. While withdrawal liability is imposed by federal statute (*see*, 29 U.S.C. § 1381), obligations to contribute may

(Footnote continued)

The decision below stands alone in failing to find a withdrawal where the agreement to transfer partnership interests does not provide for the assumption of the original employer's obligation to contribute by the successor. In light of the Second Circuit's clear errors, and the resultant distortion of the statutory scheme devised by Congress, this Court should address the questions presented.

3. *The Decision Below Threatens the Stability of Multiemployer Plans*

Respondent argues, incorrectly, that 29 U.S.C. 1392(c), the so-called "anti-sham provision", adequately protects multiemployer plans from sales of partnership interests in which the original employer's obligation to contribute is not assumed by the successor. Respondent further suggests, again incorrectly, that such transactions are unlikely to occur and do not pose a significant threat to the plans.

PSHC ignores its own conduct. By its own admission, respondent structured the transaction herein as a sale of partnership interests, rather than as a direct sale of assets, in order to avoid adverse *tax* consequences. *See*, 581 F.2d at 581 (16a); 671 F. Supp. at 1002 (29a). Surely, other equally sophisticated parties can be expected to restructure their deals as sales of partnership interests to avoid adverse *withdrawal liability* consequences if the decision below is permitted to stand. In that event, the otherwise legitimate transactions will be shielded from § 1392(c) by the authority of the decision below.

Since such transactions undermine the ability of multiemployer plans to collect withdrawal liability, and threaten their contribution bases, thereby frustrating the intent of Congress, this Court should not permit the decision below to stand.

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arise from collective bargaining agreements (*see*, 29 U.S.C. § 1392), as in the instant case. Thus, although the parties to a transaction cannot, by agreement, avoid a withdrawal liability, the successor employer may decline to assume its predecessor's *contractual* obligation to contribute. *See*, the Petition at 16-17. Accordingly, Trump's refusal to assume his predecessors' obligations is *not* a mere indemnification clause. *See, id.*

Conclusion

For the foregoing reasons and those set forth in the Petition, petitioners respectfully pray that the Court issue a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit.

November 4, 1988,

Respectfully submitted,

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